future: but it is sufficient for the decision of this case that in their opinion the cheques in this case were not given for the "repayment of money lent" but rather for the purchase or discounting of other cheques. The Moneylenders Ordinance affords therefore no defence to them and the plaintiff is entitled to judgment.

Their Lordships will accordingly report to the Head of the Federation of Malaya that in their opinion this appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment of Ong J. for the plaintiff restored and that the costs of the Appeal in the Court of Appeal and of this appeal should be paid by the respondents.

Appeal allowed.

Solicitors: *Lawrence, Mener & Co.; T. L. Wilson & Co.*

JAG SINGH (an Infant) v. TOONG FONG OMNIBUS CO., LTD.

[O.C.J. (Suffian J.) December 6, 1961]

[K.L. — Civil Suit No. 60 of 1961]

Damages — Running down — Duty of care of motor vehicle drivers — Highway Code and section 59(4), Road Traffic Ordinance, 1958 — Contributory negligence — Can infant be guilty of — Assessment of general damages — Application of English cases.

The plaintiff, an infant of seven years, was run over by a bus driven by the defendants' driver whilst he was in the act of trying to board the bus at a bus stop and sustained injuries calling for amputation to his right leg above the knee. In an action for negligence, the bus company denied negligence. Alternatively, it was claimed that if they were negligent, the plaintiff was guilty of contributory negligence. It was not disputed that the defendants' driver owed a duty of care to the plaintiff but it was argued that he was not guilty of a breach of this duty.

Held: (1) the standard of care prescribed by law on the basis of English authorities, was that laid down by section 25 of the Highway Code. Section 59(4) of the Road Traffic Ordinance, 1958 permitted evidence to be given by a party in civil or criminal proceedings of the failure on the part of the other party to observe any provisions of the Highway Code. Plaintiff could therefore rely on such evidence to establish liability and, on this test, liability for negligence by the defendants' driver had been established;

(2) in a question of contributory negligence the existence of such negligence does not depend on any duty owed by the injured party to the party sued. All that is required to be proved is that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. Test laid down by Lord Simon in *Nance* v. *British Columbia Electric Railway* (4) approved and applied;

(3) the test of what is contributory negligence is the same in the case of a child as of an adult, modified only to the extent that the degree of care to be expected must be proportionate to the age of the child;

(4) as to general damages, awards made by English Courts should not be slavishly followed in Malaya. *Pahang Lin Siong Motor Co. Ltd.* v. *Cheong Swee Khai & Anor.* (6).

Cases referred to:—

(1) *London Passenger Transport Board* v. *Upson* [1949] 1 All E.R. 60.

(2) *Fardon* v. *Harcourt-Rivington* (1932) 48 T.L.R. 215.

(3) *Daly* v. *Liverpool Corporation* [1939] 2 All E.R. 142.

(4) *Nance* v. *British Columbia Electric Railway* [1951] A.C. 601.

(5) *Phillips* v. *L. & S.W. Ry.* 1879, 4 Q.B.D. 406.

(6) *Pahang Lin Siong Motor Co. Ltd. & Anor.* v. *Cheong Swee Khai & Anor.*, [1962] M.L.J. 29.

ACTION.

Denis Murphy (*Tara Singh* with him) for the plaintiff.

M. Edgar for the defendant.

Cur. Adv. Vult.

Suffian J.: This is an action for negligence brought against a bus company by an infant suing by his father and next friend. On the 13th day of November, 1959, the plaintiff was standing on the roadway at or near the bus stop at Pudu Road near the junction of Pudu Road and Sultan Street in Kuala Lumpur when (it was claimed) he was negligently knocked down and injured by motor bus No. BA 4383 which was being driven along Pudu Road in the direction of Sultan Street by a bus driver employed by the company. The bus ran over the plaintiff's right leg which had to be amputated above the knee. The company denied negligence and claimed alternatively that if they had been negligent the plaintiff was guilty of contributory negligence.

It is not disputed that the defendant's driver owed a duty of care to the plaintiff, but the question is, was he guilty of a breach of this duty to take care by failing to attain the standard of care prescribed by law?

What is the standard of care prescribed by law? In *London Passenger Transport Board* v. *Upson*,(1) Lord Uthwatt said at p. 70:—

> "A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form these follies commonly take".

Lord Du Parcq expressed the same opinion in these words (at page 72):—

> "A prudent man will guard against the possible negligence of others, when experience shows such negligence to be common . . . A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are, in fact, likely to do".

Viscount Dunedin in *Fardon* v. *Harcourt-Rivington*(2) said at p. 216:

> "If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions".

Stable J. in *Daly* v. *Liverpool Corporation*,(3) stated at page 144:

> "My view is that the sooner it is recognised as being the law that a person who drives a motor vehicle under modern conditions is in precisely the same position as,

for instance, that of a surgeon or a person who undertakes to perform an extremely difficult task, involving extremely dangerous consequences for other persons, the better. The standard of care and skill which the law must demand from the driver of a motor car today is a very high one indeed. A motor car has become a lethal weapon".

The driver was approaching this bus stop. He saw a crowd of school children at the stop while he was about 60 feet away. As he neared the stop, many school children left the shelter of the sheds at the stop and swarmed into the roadway. It is alleged that as the bloodmark at the spot where the plaintiff was run over was nine feet long the driver must have been going quite fast, but I do not believe that he was then driving fast. The length of the bloodmark can be explained by the fact that the driver did not see the child he had run over and he first knew about it only when he heard cries. During the interval between hitting the child and stopping the bus he must have travelled nine feet. Nevertheless the Highway Code by section 25 provides:—

"A driver must stop if by so doing he can avoid an accident or even the risk of an accident"; and

section 59(4) of the Road Traffic Ordinance No. 49 of 1958 provides:

"Failure on the part of any person to observe any provisions of the Highway Code . . . may in any proceedings, whether civil or criminal, be relied on by any party to the proceedings as tending to establish or to negative any liability which is in question in these proceedings".

Applying these tests, I am of the view that on the evidence the driver of the defendant company was guilty of a breach of the duty to take care, which he owed to the plaintiff, by failing to attain the standard of care prescribed by law.

The next question which arises is whether or not the plaintiff was himself guilty of contributory negligence. As to this, Lord Simon in *Nance* v. *British Columbia Electric Railway*,[4] stated at page 611:—

"When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove . . . . that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury"

It will be noted that the plaintiff at the time of the accident was 7 years old. Can a child of such tender years be guilty of contributory negligence? As to this, *Charlesworth* on Negligence, 3rd Edition, states at page 525:

"When a child is negligent, in the sense that he could by the exercise of 'reasonable care' have prevented or avoided the damage in question, he cannot recover; but in considering what is 'reasonable care' the age of the child must be considered. Infancy as such is not a 'status conferring right' so that the test of what is contributory negligence is the same in the case of a child as of an adult modified only to the extent that the degree of care to be expected must be proportionate to the age of the child".

In this case the plaintiff was waiting for the bus at this particular stop on his way home from school. There were many other school children waiting for the bus. On seeing the bus many of them surged towards it. It seemed that the plaintiff was ahead of the crowd and in his eagerness to board the bus he went into the roadway 19½ feet from the kerb and two feet outside the lamp post marked A in the plan Exhibit P.1. He got into the path of the oncoming bus and was run over. He must have been stepping out at the time because of the location of the injuries suffered by him. They were crushing injuries suffered on the front part of his leg around and below the knee. Clearly in my view he had not in his own interest taken reasonable care of himself and contributed, by his want of care, by stepping so far out into the roadway, to his own injury although the driver himself could have avoided the accident by stopping in time.

The driver in his evidence stated that normally he stopped his bus at the head of the sheds marked P.1 and P.2 in Exhibit P.1. The plaintiff claimed that sometimes the bus did stop near the lamp post marked A in the plan, 17½ feet from the kerb. I am of the view that probably both parties are right. If there were no other buses in front of him, the driver would normally stop at the head of the sheds, but he would stop further back (sometimes as far back as at the lamp post) if there were other buses in front of him.

As to the apportionment of the blame between the plaintiff and the bus driver, I am of the view that both parties were equally to blame and I so apportion the blame.

As to quantum, I award $390 being half of the amount of special damages claimed.

As regards general damages, Cockburn C.J. in *Phillips* v. *L. & S. W. Ry.*[5], stated that the court should consider and take into account the following heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation:—

"These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life";

In attempting to place the plaintiff in so far as can be done by money in the same position as he would have been in but for the negligence of the defendant's driver, I am seriously handicapped by the fact that at the time of the accident the plaintiff was only seven years of age and was not a working man earning money. His injuries were serious, his pain and suffering excruciating. Because of the amputation his mobility has been seriously affected, but not his

mental capacity and if he does well at school there is nothing to stop him from earning a living in a sedentary occupation or even from achieving eminence in the professions or politics. Nevertheless I take into account the probability that he might not have the mental equipment necessary for these positions, in which event his lack of mobility would be a serious handicap to his future livelihood. Considering all these factors and considering the social class to which the plaintiff belongs (his father is a watchman who sends two of his sons to an English school) and giving this matter the best consideration I can in the circumstances, I award $7,500 general damages, that is, half the damages I would have awarded for 100% liability.

Mr. Murphy for the plaintiff cited cases from England to persuade me to award thirty to forty thousand dollars. I am of the opinion, however, that awards made by English courts should not be slavishly followed in Malaya. As Thomson C.J. said in *Pahang Lin Siong Motor Co. Ltd. and Bishen Singh* v. *Cheong Swee Khai and Loh Soo Chai*,[6]:

". . . . . local social, economic and industrial conditions are poles apart from conditions in England and Scotland and any tendency to take a particular line in relation to assessment of damages in cases of this type from a consideration of English and Scottish cases is not calculated to produce very useful results. Times may be changing but this is still not an industrial country. The economy is still, generally speaking, a peasant economy in which the typical figures are the small cultivator and the small trader. This in its turn, although of course strictly speaking it does not affect the value of money, produces the consequence that small sums of capital are more difficult to acquire and more sought after than in England and, when acquired, are much more prized and are of much greater economic utility. In England the ordinary working man would not, generally speaking, be greatly attracted by the prospect of enough capital to acquire a small agricultural holding or open a small shop whereas in this country such an opportunity would generally be welcomed with avidity. For example $25,000 in this country will purchase enough rubber land or padi land to enable a family to live in very great comfort with very little exertion. It is only in the most exceptional circumstances that a sum of £3,000 would produce such a result in England or Scotland.

Again, it must be remembered that, generally speaking, money wages are lower in this country than in England".

As regards costs, the plaintiff should get half his taxed costs.

Order accordingly.

Solicitors: *Murphy & Dunbar; Bannon & Bailey.*

TEH TEIK BOAY v. CHUAH SIAK LOO

[O.C.J. (Hepworth J.) December 12, 1961]

[Penang — Civil Suit No. 250 of 1961]

Patents and Designs — United Kingdom Designs (Protection) Ordinance, 1949, ss.2 and 4 — Designs registered under U.K. Registered Designs Act, 1949, ss.1 and 11 — Purported infringement — Injunction to restrain — Whether design new or original — Publication.

The plaintiff the registered owner of a design in respect of wooden stools claimed under the United Kingdom Designs (Protection) Ordinance, 1949, for an injunction to restrain the defendant from infringing his design registered under the Registered Designs Act, 1949, of the United Kingdom and an order for defendants to deliver up all infringing materials manufactured in the course of infringement of the said design, an account of all stools to which the said design had been applied made or sold or exposed for sale by the defendant; and profit made thereby; and damages and costs. The defence was that there was no infringement of the design because the design was not new or original and that stools of such design or of a design not substantially different had been manufactured for several years by the defendant and other furniture makers in the Federation of Malaya prior to the registration of the said design by the plaintiff. The defendant counterclaimed under section 4 of the Ordinance that exclusive privileges and rights in the said design had not been acquired in the Federation of Malaya by the plaintiff.

Held: there was publication of the design prior to the date of registration because stools substantially similar to those which had been manufactured to the design which was registered had been made by the defendant and sold to the public, presumably at a profit, in considerable quantities either directly or through furniture dealers over a period of five years prior to the registration of the design, and consequently the design was not new or original.

CIVIL SUIT.

Eusoffe Abdoolcader for the plaintiff.

C. O. Lim for the defendant.

Cur. Adv. Vult.

Hepworth J.: The plaintiff's claim is under the United Kingdom Designs (Protection) Ordinance, 1949, (hereinafter referred to as "The Ordinance") for an injunction to restrain the defendant from infringing the plaintiff's Registered Design No. 896082, registered under the Registered Designs Act, 1949, of the United Kingdom (hereinafter referred to as "The Act"), delivery up of all infringing materials manufactured in infringement of the said design, an account of all stools, to which such design has been applied, made or sold or exposed for sale by the defendant and profit made thereby, damages and costs.

The plaintiff is the registered owner of the Registered Design No. 896082 in respect of a wooden stool. The plaintiff claims that the defendant has infringed the said design in that subsequent to the registration of the said design the defendant has made and sold or offered for sale wooden stools manufactured in accordance with a design identical or similar to or not substantially different from the design disclosed in the complete specifications of the said Registered Design. Put briefly, the defence is that there has been no infringement of the design for the reason that the design was not new or original and that the design is a common design and stools of such a design or of a design not substantially different have been manufactured for several years by the defendant and other furniture makers in the Federation of Malaya prior to the registration of the said design by the plaintiff. The defendant also counterclaims for a declaration under section 4 of the Ordinance that exclusive privileges and rights in the said design have not